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State v. Hall Appellant's Brief Dckt. 42847

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. HENRY MARTYN HALL Defendant/Appellant.	)	APPELLANT'S BRIEF SUPREME COURT NO. 42847 CR-14-0010233

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE RICH CHRISTENSEN
District Judge

JOHN M. ADAMS
Kootenai County Public Defender

JAY LOGSDON
Deputy Public Defender
400 Northwest Blvd.
P.O. Box 9000

Coeur d'Alene, ID 83816

ATTORNEY FOR APPELLANT

LAWRENCE G. WASDEN
Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

A. Nature of the Case

Coeur d'Alene Police Officers arrested Henry Martyn Hall on May 28, 2014, and placed him in the custody of the Kootenai County Sheriff. Mr. Hall would spend the next two hundred and five (205) days in administrative segregation of one type or another, consisting of a small padded room with no windows. For months he was denied any reprieve from his cell and kept naked safe for a smock. During much of this time Mr. Hall was on suicide watch due to various actions he took, including at one point cutting open his wrist with an unknown object, and then later reopening the wound and rubbing feces in it, and then refusing medical assistance to prevent infection. For a few short weeks in October he would be taken to the Kootenai Medical Center to be treated for his various mental illnesses.

Mr. Hall pled guilty to burglary on November 11, 2014, but maintained his innocence pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). In exchange, the state dismissed a grand theft charge and a carrying a concealed weapon without a permit charge, and agreed to recommend no more than a five year unified sentence consisting of three years fixed and two indeterminate.

At sentencing, Mr. Hall had filed a Memorandum in Aid of Sentencing and Motion to Commute Sentence. He requested that the Court give him a change at a retained jurisdiction or impose a two year sentence. He argued that the sentence should be shortened in light of the months he spent in solitary confinement without proper care. The District Court found that his treatment prior to sentencing was not relevant to his sentence, and imposed a five year unified sentence as requested by the state. Mr. Hall timely appealed from the sentence.

B. Course of Proceedings & Statement of Facts

Henry Martyn Hall was born in Seattle, WA, on [redacted] Presentence Investigation Report (hereinafter "PSI") p. 1. He spent the first four years of his life being sexually, physically, and mentally abused by his mother's first husband. PSI p. 15. When he was four years old, she left him at his grandparents and disappeared for four years. *Id.* When she returned, Mr. Hall used marijuana for the first time at the age of eight. PSI p. 15, 20. He would remain with her and her abusive husband for six months before returning to his grandparents. *Id.* Academically, Mr. Hall had trouble in school due to his mental illness. PSI p. 15. Mr. Hall committed his first crime at the age of thirteen, and by fifteen he would be placed in the custody of the state and sent to a mental hospital. PSI p. 8, Tr. p. 41, L. 6-14. After that he would go into foster care but be placed with his grandfather. Tr. p. 41, L. 15-19. As a child, Mr. Hall recalls being diagnosed with depression, anxiety, bi-polar disorder, ADD, ADHD, and abandonment issues. PSI p. 15. He was passed back and forth between various caregivers and encountered drug abuse among his family members. *Id.*

For the next several years, Mr. Hall spent time in Montana, Indiana, and Idaho. PSI p. 9-11; Tr. p. 41, L. 25, p. 42, L. 1-25. Much of this time was spent in custody. *Id.* In or around November 23, 2002, Mr. Hall was arrested for Burglary in Idaho with a pending Burglary case in Montana. PSI p. 12; Tr. p. 42-44. Mr. Hall would spend the next ten years in prison in Idaho. Tr. p. 44, L. 14-23. During his time in prison, he would be diagnosed with various mental illnesses and be given various medications. Tr. p. 46, L. 2-25, p. 47, L. 1-20. Upon his release from prison in July of 2013, he reports that he was given no reintegration services and his medications simply stopped. Tr. p. 44, L. 24-25, p. 45, L. 1-4. During the next few months, Mr. Hall would be charged with drug related

offenses in Washington and Idaho. PSI p. 12-13.

On May 28, 2014, Coeur d'Alene officers arrested and booked Mr. Hall into the Kootenai County Public Safety Building (hereinafter "the jail"). PSI p. 6. The jail was unable to provide Mr. Hall with a mental health evaluation or medication, beyond social workers from ACES Community Services finding he was a danger to himself and placing him in medical observation. *See* Defendant's Motion for Payment of Costs of Mental Health Evaluations Out of District Court Fund (hereinafter "Motion for Mental Health Evaluation", p. 2 (filed under seal on July 30, 2014); Keith Cousins, *Mental Illness Services Limited*, COEUR D'ALENE PRESS (Aug. 10, 2014); Tr. p. 61, L. 2-17.

Due to suicidal ideation and behavioral issues, Mr. Hall was placed in administrative segregation, in safety cells, holding cells, and "medical observation cell," meaning a ten-foot by twelve-foot holding cell with no open windows, and padded walls. *See* Jail Bureau Policy & Procedure Manual, Kootenai County, Vol. III, 45-52, 62-63 (2008) (hereinafter "Manual"); Response to Defendant's Sentencing Memorandum, Watch Commander Log entries for June 7, 28, 2014, July 11, 2014, August 2, 17, 19, 2014, September 4, 19, 2014, October 6, 2014, November 4, 5, 6, 7, 26, 2014, December 8, 10, 2014 (hereinafter "Log") (filed December 15, 2014); Tr. p. 27, L. 10-19; p. 63, L. 12-23, p. 70, L. 18-19, p. 71, L. 1-8. He was only allowed a smock and sandals to wear. *See id.* At times, Mr. Hall was placed in restraints involving a belly chain, safety mittens, and a Restraint Chair. Log entry for August, 1, 2014.

On or about July 21, 2014, based on the request of defense counsel and the reports of ACES, the state moved for Mr. Hall's commitment. Motion for Mental Health Evaluation, p. 2. On July 23, 2014, Mr. Hall was found mentally ill and a danger to himself, but in violation of I.C. § 66-329(5) he was returned to the jail. *Id.* On July 26, 2014, Mr. Hall opened his wrist by an unknown method and

was taken to the Kootenai Medical Center for stitches, and then returned to the stripped cell in holding. *Id.* On July 28, 2014, the state moved to dismiss its petition for lack of a second designated examination, in violation of the Magistrate's orders. *Id*; *see, also*, Tr. p. 30, L. 1-14; p. 62, L. 1-20.

On August 5, 2014, the District Court ordered payment for a mental health evaluation out of the District Court fund. Order for Payment of Costs of Mental Health Evaluation Out of District Court Fund (filed under seal). On August 28, 2014, that evaluation was completed and Mr. Hall was diagnosed with, among other things, Major depressive affective disorder and a Generalized Anxiety Disorder, and prescribed medications. Mental Health Records (filed under seal on August 28, 2014); Emergency Motion for Appointment of Designated Examiner (filed September 22, 2014).

Eventually on October 3, 2014, Mr. Hall was committed to the Department of Health and Welfare for mental health care. PSI, p. 19; Tr. p. 30, L 1-16. On October 16, 2014, that commitment was terminated and he was returned, now on a different set of medications, to the jail. *Id.*

On November 11, 2014, Mr. Hall entered an Alford plea to burglary. Tr. p. 17-23. Mr. Hall accepted that a jury might find he had entered the home of strangers at roughly four o'clock in the morning to steal. Tr. p. 20-23. Mr. Hall attempted to go to sentencing but due to the complexity of his case and the fact that the victims had not been notified, sentencing was set out one month and a presentence investigation ordered. Tr. p. 33-35.

Prior to sentencing Mr. Hall filed Materials in Aid of Sentencing and a Memorandum in Aid of Sentencing and Motion to Commute Sentence. The state filed a Response to Defendant's Sentencing Memorandum. On December 19, 2014, the District Court heard from the parties as to Mr. Hall's sentence. The Court eventually held that in weighing Mr. Hall's crime with his character, taking into account his mental illness, it would impose a five year unified sentence consisting of

three years fixed and two indeterminate. Tr. p. 77-78. The Court hoped that the chance at parole would ensure that Mr. Hall would not suffer the same fate the next time he was released from custody. Tr. p. 79. However, the Court found that the issues of his treatment prior to sentencing were not proper for sentencing.

> THE COURT: The Court notes the defendant's briefing regarding the state of mental illness as – at this time as a public health problem, in essence.
>
> The Court notes that there is a great movement afoot by various states to make real changes in caring for the mentally ill, but this Court on this day and in this case is not the forum to resolve the state of treatment for the mentally – mental illness.

Tr. p. 78, L. 14-21.

The defendant timely appealed from the District Court's judgment.

ISSUES ON APPEAL

I. Whether the conditions of a defendant's pre-sentencing confinement are a factor for sentencing when they do significant mental harm to the defendant.

ARGUMENT

I.

A. Introduction

The District Court erred in holding that conditions of pre-sentencing confinement are not a factor to be considered at sentencing even if they arise to the level of pretrial punishment in violation of Due Process and Cruel and Unusual Punishment in violation of the Eighth Amendment to the United States Constitution.

B. Standard of Review

Sentencing is a matter for the trial court's discretion. The standard of review of a sentence, as well as the factors to be considered in evaluating the reasonableness of the sentence, are well-established. "Where a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Cotton*, 100 Idaho 573, 577 (1979). In determining whether the sentencing court abused its discretion, an appellate court reviews all the facts and circumstances of the case. *State v. Broadhead*, 120 Idaho 141, 143 (1991). In order to show an abuse of discretion, the defendant must show that in light of the governing criteria, the sentence was excessive, considering any view of the facts. *Id.* at 145. The governing criteria, or objectives of criminal punishment are: " '(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.' " *Id. quoting State v. Wolfe*, 99 Idaho 382, 384 (1978).

C. Conditions of a defendant's pre-conviction and pre-sentencing confinement are a factor to be considered at sentencing.

The District Court had the discretion to impose a sentence between one and ten years. I.C. § 18-1401. However, I.C. § 19-2521 states:

> The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:
>
> > (a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
> >
> > (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
> >
> > (c) A lesser sentence will depreciate the seriousness of the defendant's crime; or
> >
> > (d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or
> >
> > (e) Imprisonment will provide an appropriate deterrent for other persons in the community; or
> >
> > (f) The defendant is a multiple offender or professional criminal.

The District Court was also is aware of the sentencing factors in *State v. Toohill*, 103 Idaho 565 (Ct.App.1982). The Court of Appeals in *Toohill* held:

> We believe the ABA principle-that a term of confinement should not exceed the minimum necessary to accomplish sentencing objectives-can be integrated with Idaho sentencing policy. The resultant formulation adds meaning to the concept of "reasonableness." We hold that a term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. A sentence of confinement longer than necessary for these purposes is unreasonable.

In matters involving the mentally ill, however, the Court of Appeals has held:

> We recognize, as did the district court, that Leach's crime was a product of her mental illness. **Therefore, the sentencing goals of retribution and personal deterrence do not come into play, and it is likely that the goal of rehabilitation would be better accomplished by treatment outside the confines of a correctional facility.** [emphasis added]

State v. Leach, 135 Idaho 525, 534 (2001).

The District Court recognized Mr. Hall's mental health issues. Tr p. 78, L. 1-10. However, the Court determined that Mr. Hall's treatment prior to sentencing was not relevant to the sentence he received. Tr. p. 78, L. 11-21.

Two authorities require a sentencing court to take presentence confinement into account at sentencing. First, pursuant to I.C. § 18-309, a defendant is to receive credit toward his sentencing for time he serves in the state's custody prior to sentencing. In this case, the District Court gave Mr. Hall two hundred and five (205) days of credit for presentence incarceration toward the sentence. Thus, the law requires a court to convert pretrial confinement into punishment.

The second authority is the *Toohill* factors. The time a defendant serves prior to sentencing is considered part and parcel of the punishment aspect of a Court's sentence. *See State v. Dana,* 137 Idaho 6, 8 (2002); *State v. Tousignant*, 123 Idaho 22, 24 (Ct.App.1992).

The issue raised by Mr. Hall and rejected by the District Court is whether a sentencing court should consider conditions of confinement when imposing the sentence and treat conditions that rise to the level of pretrial punishment in violation of Due Process as a mitigating factor. In *Mahaffey v. State*, 87 Idaho 228, 230, 232 (1964), the Idaho Supreme Court, confronted with a petition in which a prisoner alleged beatings, denial of medical care, being held in solitary for long periods, being frustrated in his attempts to file for habeas corpus, held:

> if these facts are true, some are 'inexcusable and shocking.' There can be little doubt but what petitioner has alleged a prima facie case of cruel and unusual punishment. Most jurisdictions seem to adhere to the rule that while ordinarily courts will not interfere in prison affairs, an exception will be made in cases involving a prisoner's constitutional right to be secure from cruel and unusual punishment.

citing Hughes v. Turner, 378 P.2d 888 (Utah 1963); *Harris v. Settle*, 322 F.2d 908 (8th Cir., 1963); *In re Baptista's Petition*, 206 F.Supp. 288 (W.D.Mo., 1962). *See also: Application of Brux*, 216 F.Supp. 956 (D.C.Ha., 1963); *In re Riddle*, 372 P.2d 304 (Cal. 1962); *In re Jones*, 372 P.2d 310 (Cal. 1962); *Coffin v. Reichard*, 142 F.2d 443 (6th Cir.1944); *McBride v. McCorkle*, 44 N.J.Super. 468, 130 A.2d 881 (1957). When such conditions are present pretrial, they constitute a Due Process violation known as pretrial punishment. *See Mallery v. Lewis*, 106 Idaho 227, 231, 235 (1983).

The Idaho Court of Appeals has recognized that unconstitutional conditions of confinement may allow courts to go "beyond the traditional remedy of release." *Russell v. Fortney*, 111 Idaho 181, 183 (2014). At the same time, the Court of Appeals has held that conditions of confinement are "preferably addressed in post-conviction or habeas corpus proceedings." *State v. Sherman*, 120 Idaho 464, 466 (1991) *citing State v. Sommerfeld*, 116 Idaho 518 (Ct.App.1989); *State v. Garza*, 115 Idaho 32 (Ct.App.1988). However, those cases involve a defendant complaining that the prison does not provide sufficient rehabilitative programming, not, as in this case, that they are being mentally harmed by the conditions of their confinement. *See id.* Lack of rehabilitative programming could never been considered pretrial punishment in violation of Due Process, whereas months of solitary confinement for the mentally ill, as will be shown in the next section, can and are.

However, no case law exists on the affect that pretrial punishment should have on a sentencing, save for the well-developed jurisprudence of the United States Military. While there is no obvious explanation for why the issue has never been raised outside the military, it is easy to see why the military has developed the issue so well- Article 13 of the Uniform Code of Military Justice states:

Subject to section 857 of this title (article 57) [Effective date of sentences], no

> person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

The Court of Military Appeals found that Article 13 puts the following squarely at issue:

> "Whether the circumstances of accused's pretrial confinement resulted in a denial of due process of law."

U.S. v. Nelson, 39 C.M.R. 177, 178 (C.M.A. 1969). But Article 13 merely prohibits what the Due Process Clause of the United States Constitution already prohibits, and so while perhaps giving a clear passage to cite to in briefing, its existence still does not explain by its existence the total lack of opinions on the topic of what constitutes pretrial punishment and how it should be viewed by courts at sentencing in state and federal criminal proceedings. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law"); *Mallery* 106 Idaho at 231, 235. In view of the lack of authority on the issue, the military courts provide a good starting point for courts in Idaho to consider how Mr. Hall's confinement should have been treated at his sentencing.

First, the Court of Military Appeals has construed the prohibition on pretrial punishment thus:

> From the foregoing, the conclusion is inescapable that Congress, the framers of the Manuals for Courts-Martial, and the Army must have recognized that gross injustices might result from any confinement system in which one accused of crime was treated no better than one proved guilty. Therefore, to eliminate any and all forms of punishment prior to trial, except that which is inherent in all confinement, laws and regulations were enacted to protect the untried confinee. It must be remembered that the only valid ground for ordering confinement prior to trial is to insure the continued presence of the accused, as where he has earlier indicated that his obligation to remain with his unit weighs lightly with him, or where the seriousness of the offense alleged is likely to tempt him to take leave of his surroundings.

U.S. v. Bayhead, 21 C.M.R. 84, 90 (C.M.A. 1956); *cf. Bell*, 441 U.S. at 535-540 (discussing proper inquiry into constitutionality of conditions of pretrial detention). The Court placed heavy emphasis on this concept in *Nelson*, 39 C.M.R. at 181-82 when it held:

> Ordinarily the board of review is the appropriate tribunal for reassessment of sentences found faulty at this level. However, this accused has already served his sentence to confinement at hard labor, and the only unexecuted portion of the sentence is the punitive discharge. Under these circumstances, were we simply to return the case to the board of review for reassessment of the sentence, we would thereby imply that the bad-conduct discharge may be affirmed. **Such a course would deprive the accused of all meaningful relief, and would rightly suggest that this Court is prepared to wink at such grossly illegal treatment of men in pretrial confinement. The disastrous effects of such a situation upon the system of military justice itself are so manifest as to require us to eliminate that possibility.** [emphasis added]
>
> Accordingly, the decision of the board of review as to sentence is reversed. The record of trial is returned to the Judge Advocate General of the Navy. A board of review may reassess and approve a sentence which does not include a bad-conduct discharge.

Military courts have approved various types of relief for pretrial punishment, from outright dismissal, as in *Bayhead*, to requiring the sentencing judge to consider it as a mitigating factor, as in *U.S. v. Gettz*, 49 C.M.R. 79, 83 (N.C.M.R. 1974). In *U.S. v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011), the accused was in "virtual lockdown" status for a period of 119 days while in pretrial confinement. The accused was denied access to mental health counseling, despite repeated requests. The military judge ultimately awarded 4-for-1 credit, but noted that "the court is very tempted to provide ten-for-one credit solely on the mental health issue considering this installation's notice of the seriousness of the mental health issues." In *Zarbatany*, the 4-for-1 credit proved to be "meaningful relief" since the accused was only sentenced to confinement for six months (and thus, the confinement credit exceeded his sentence). *See U.S. v. Zarbatany*, 2012 WL 215865 (A. F. Ct. Crim. App.); *See also U.S. v. Tilghman*, 44 M.J. 493

(C.A.A.F. 1996) (awarding ten-for-one credit for illegal pretrial confinement in contravention of judge's order).

The military also does not restrict its review to the conditions or requirements the government put in place. In *U.S. v. Fulton*, 55 M.J. 88, 90-91 (C.A.A.F. 2001), Chief Justice Crawford stated:

> A court should not use its supervisory authority to impose extraordinary remedies to vindicate wrongs unless the person allegedly wronged has sought, and failed to obtain, reasonable, remedial relief through, *e.g.*, command channels, either directly or under Article 138, UCMJ, 10 USC § 938; the Inspector General's Office; or the Chaplaincy. If the command and staff offices have turned a blind eye toward an egregious situation, dismissal of court-martial changes would be warranted as an extraordinary measure.

See, also, Zarbatany, 70 M.J. at 172 (finding illegal pretrial punishment where "specific complaints ... should have put the commander on notice that [the accused] was being illegally punished [but] he didn't care because he thought the punishment was appropriate for the crimes he had done – overcoming the accused's presumption of innocence.").

These holdings are in accord with Supreme Court holdings on pretrial punishment allegations brought as habeas petitions. "The courts must determine whether the condition or restriction is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 229. In *Bell v. Wolfish* the U.S. Supreme Court identifies some useful guideposts in determining whether pretrial detainment amounts to a punishment, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." 441 U.S.at 539. The Court further expounded in *Bell* that, if there is no showing of express intent of punishment the "determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose

assigned to it." *Id.* Conditions of confinement can amount to cruel and unusual punishment when they deprive the prisoner of some of his basic human needs such as food, warmth or exercise. *Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991). And "contemporary standards of decency must be brought to bear in determining whether a punishment is cruel and unusual." *Bass v. Perrin*, 170 F.3d 1312, 1316 (11th Cir. 1999).

Thus, the decisions of the military courts as to the effect of cruel and unusual conditions that harm prisoners and constitute presentence punishment prior to sentencing should be persuasive in Idaho. While protection of society may be the utmost goal in sentencing, under the principles of fundamental fairness and equity held in high esteem by Idaho's judiciary, the *Toohill* factors, and I.C. § 19-2521, harmful conditions of confinement that qualify as pretrial punishment should be given the weight they deserve when a court is determining what more punishment, if any, a defendant requires. *See State v. Perry*, 150 Idaho 209 (2010); *State v. Card*, 121 Idaho 425 (1992); *State v. Saviers*, 156 Idaho 324 (Ct.App.2014); *State v. Miller*, 151 Idaho 828, 834 (2011); *State v. Strand*, 137 Idaho 457, 460 (2002); *Toohill*, 103 at 568; *U.S. v. Fulton*, 55 M.J. at 90-91; *U.S. v. Gettz*, 49 C.M.R. at 83. Without taking into account the fact that a defendant was exposed to cruel and unusual punishment prior to sentencing, the Court cannot possibly determine the sentence which is "necessary," as it ignores the intensity of the retribution and deterrence imposed on the individual, the now greater need for rehabilitation, and the needs of society under all the circumstances. *See Miller*, 151 at 834.

This Court should find that the District Court abused its discretion by failing to recognize that presentence punishment that rises to pretrial or cruel and unusual punishment should be a factor at sentencing. *See State v. Byington*, 132 Idaho 589, 592 (1999); *State v. Adams*, 99 Idaho 75, 85 (1978). This Court should remand the matter for findings as to whether Mr. Hall endured cruel and

unusual punishment, and if so, to take that into account in crafting his sentence.

D. The defendant provided the District Court with facts which if believed would have been a mitigating factor to be considered at sentencing.

As noted above, in cases involving pretrial detention, in order to show a violation of the Due Process clause, a defendant must show that the restrictions placed upon him are "not reasonably related to a legitimate goal." *Bell*, 441 U.S. at 539. Unlike a convicted prisoner, a pretrial detainee's treatment is viewed objectively, with no inquiry into whether the government was motivated to punish him or had a deliberate disregard for the pretrial detainee's welfare. *Id.* at 539-540; *see, also, County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). Thus, in *Youngberg*, the Court held restraints on the mentally ill could not be more than those deemed necessary by professionals in a mental hospital. 457 U.S. at 323-24.

In this case, Mr. Hall spent months in solitary confinement due to mental illness. *See, generally*, Log; Manual, p. 45-52, 62-63. While the jail refers to the various conditions Mr. Hall was held in as administrative segregation, medical observation, a stripped cell, and as being under suicide watch (Manual, p. 45-52, 62-63), its actual components are what are commonly recognized as solitary confinement:

> Solitary confinement is the practice of placing a person alone in a cell for 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; restriction or denial of reading material, television, radios or other property; severe constraints on visitation; and the inability to participate in group activities, including eating with others. While some specific conditions of solitary confinement may differ among institutions, generally the prisoner spends 23 hours a day alone in a small cell with a solid steel door, a bunk, a toilet, and a sink. Human contact is restricted to brief interactions with corrections officers and, for some prisoners, occasional encounters with healthcare providers or attorneys. Family visits are limited; almost all human contact occurs while the prisoner is in restraints and behind a partition. Many prisoners are only allowed one visit per month, if any. The amount of time a person spends in solitary confinement varies, but can last for months, years, or even decades.

> Solitary confinement goes by many names, whether it occurs in a supermax prison or in a unit within a regular prison. These units are often called disciplinary segregation, administrative segregation, control units, security housing units (SHU), special management units (SMU), or simply "the hole." Recognizing the definitional morass, the American Bar Association has created a general definition of solitary confinement, which it calls "segregated housing":
>
> The term "segregated housing" means housing of a prisoner in conditions characterized by substantial isolation from other prisoners, whether pursuant to disciplinary, administrative, or classification action. "Segregated housing" includes restriction of a prisoner to the prisoner's assigned living quarters.
>
> The term "long-term segregated housing" means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days.
>
> In 2013, the Department of Justice employed a similar definition, noting that "the terms 'isolation' or 'solitary confinement' mean the state of being confined to one's cell for approximately 22 hours per day or more, alone or with other prisoners, ... [with] limit[ed] contact with others. . . . An isolation unit means a unit where all or most of those housed in the unit are subjected to isolation."

ACLU, *The Dangerous Overuse of Solitary Confinement in the United States* (2014) (footnotes omitted) *citing* United States Department of Justice, Letter to the Honorable Tom Corbett, Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation, May 31, 2013, at p. 5 (emphasis in original), *available at* http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf (*citing Wilkinson v. Austin*, 545 U.S. 209, 214, 224 (2005), where the United States Supreme Court described solitary confinement as limiting human contact for 23 hours per day, *and Tillery v. Owens*, 907 F.2d 418, 422 (3d Cir. 1990), where the Third Circuit described it as limiting contact for 21 to 22 hours per day)); ABA Crim. Just. Standards on the Treatment of Prisoners, Standard 23-1.0(o), (r) (2010), available at http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf; Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-*

Free Time of Male Prisoners, 48 J. OF OFFENDER REHABILITATION 529, 532 (2009); Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME AND JUST. 385, 389 (2001).

Solitary has a long history in the United States. In 1890, the Supreme Court of the United States found:

> [Prisoners subject to solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890). A century later, this form of imprisonment, notably compared by most experts as having similar effects on humans as physical torture, and banned by most civilized nations, has exploded with popularity in the United States. *See* Jeffery L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, J. AM. ACAD. PSYCHIATRY LAW 38:103, 104-106 (Aug. 2010); Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 404-410 (2006).

In response, most federal circuits and states who have dealt with the issue have found that placing the mentally ill in solitary is a violation of the Eighth Amendment to the United States Constitution's ban on Cruel and Unusual punishment. *See Indiana Protection & Advocacy Services Commission* v. *Commissioner*, 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012) (holding that the Indiana Department of Correction's practice of placing prisoners with serious mental illness in segregation constituted cruel and unusual treatment in violation of the Eighth Amendment); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of prisoners with serious mental illness from "supermax" prison); *Ruiz v.*

Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) ("defendants' present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members "); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (holding prisoners with mental illness or those at a high risk for suffering injury to mental health in "Security Housing Unit" is unconstitutional); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) (finding Eighth Amendment violation when "Despite their knowledge of the harm to seriously mentally ill inmates, ADOC routinely assigns or transfers seriously mentally ill inmates to [segregation units]"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim); *T.R. et al. v. S.C. Dept. of Corrections*, C/A No. 2005-CP-40-2925 (S.C. Ct. Comm. Pleas 5th J. Cir. Jan. 8, 2014) (finding major deficiencies in the Department of Corrections' treatment of prisoners with mental illness, including solitary confinement, and ordering defendants to submit a remedial plan). *See also* Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div. & David J. Hickton, U.S. Att'y, U.S. Att'y's Office, W.D. Penn. to Tom Corbett, Gov. of Pennsylvania, Re: Investigation of the Pennsylvania Department of Corrections' Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities (Feb. 24, 2014), *available at*

http://www.justice.gov/crt/about/spl/documents/pdoc_finding_2-24-14.pdf (finding, after a system-wide investigation, that state prisons across Pennsylvania "use[] solitary confinement in ways that violate the rights of prisoners with SMI/ID [serious mental illness and intellectual disabilities]," citing "conditions that are often unjustifiably harsh," and detailing a number of other Eighth Amendment violations stemming from the practice of holding prisoners with serious mental illness in solitary confinement); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div. to Tom Corbett, Gov. of Pennsylvania, Regarding the Investigation of the State Correctional Institution at Cresson (May 31, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf; Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest 2-5, *Coleman* v. *Brown*, Case No. 2:90-cv-0520 LKK DAD PC, Doc. No. 4919 (E.D. Cal. Nov. 12, 2013) (summarizing the United States government's position on the applicability of the Eighth Amendment to the placement of prisoners with serious mental illness in solitary confinement for prolonged periods of time).

For example, the Ninth Circuit held that outdoor exercise is required when prisoners were otherwise confined in cells for almost twenty-four (24) hours a day. *Spain v. Procunier,* 600 F.2d 189, 199 (9th Cir. 1979). Solitary confinement is one of the harshest penalties that prisoners can endure. *Berch v. Stahl*, 373 F. Supp. 412, 420 (W.D.N.C. 1974). Although solitary confinement is not per se a cruel and unusual punishment "solitary confinement for excessive durations is unlawful as offending the Eighth Amendment to the Constitution." *Id.* In fact the *Berch* court held that solitary confinement for more than fifteen (15) days with a solid door or thirty (30) days with a barred door, because of its severity, was a violation of the Eighth Amendment. *Id.*

To prove an Eighth Amendment violation, prisoners must show that the government's agents intended their actions as punishment or at least that they deliberately disregarded a known problem. *Estelle v. Gamble*, 429 U.S. 97 (1976). For example, in *Sanville v. McCaughtry*, 266 F.3d 724 (7th Cir. 2001), the petitioner had to prove that her son, a mentally ill inmate who had a history of mental illness and suicide attempts, had (1) recently lost nearly one-third of his body weight, (2) written letters to his mother contemplating his death, (3) written a last will and testament, (4) told guards that he planned to commit suicide, and (5) covered his cell openings with toilet paper so that it was difficult to see inside, so as simply to state a claim that guards were aware of a substantial risk that inmate would commit suicide. As argued above, Mr. Hall need not make this showing as a pretrial detainee to establish a Due Process violation. Thus, considering that he was subjected to treatment that would be deemed cruel and unusual, it should be clear that a Due Process violation can be proven.

Additionally, the legislature of Idaho has also found that seclusion and restraints should not be used on the mentally ill except under certain circumstances:

> Restraints shall not be applied to a patient nor shall a patient be secluded unless it is determined that such restraint or seclusion is necessary for the patient's safety or for the safety of others. Every instance of a restraint or seclusion of a patient shall be documented in the clinical record of the patient. In addition, every instance of a restraint or seclusion shall be evaluated and the evaluation and reasons for such restraint or seclusion shall be made a part of the clinical record of the patient under the signature of a licensed physician or, as delegated through the bylaws of the hospital's medical or professional staff, other practitioners licensed to practice independently. Whenever a peace officer deems it necessary to apply restraints to a patient while transporting the patient from one (1) facility to another and that restraint is against the medical advice of a licensed physician, the officer shall document the use of restraints in a report to be included in the clinical record.

I.C. § 66-345. The fact that this law is intended for hospitals and not jails should not be seen as

some *carte blanche* for jails to do to the mentally ill what hospitals may not, but rather as an oversight; a mistake resulting from the fact that jails were never intended to house the mentally ill. *See State v. Hargis*, 126 Idaho 727, 731 (1995) (holding prejudgment detainees with mental health problems may be committed under Title 66 or Title 18 depending on the detainee's issue). As the Supreme Court held in *Youngberg*, the decision to restrain the mentally ill must be made by professionals:

> By "professional" decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

457 U.S. at 324 n. 30. The jail had no one with the requisite formal education making the decision to place Mr. Hall into solitary. The decision was made by guards on the basis of policies adopted by law enforcement.

Therefore, it is clear that the District Court was aware of facts which, if believed, would have shown that Mr. Hall had been exposed to presentence conditions of confinement that are in violation of the Eighth Amendment to the United States Constitution, and thus certainly a violation of his Due Process rights as guaranteed by the Fourteenth Amendment and Art. I § 13 of the Idaho Constitution. The District Court in this case found that Mr. Hall was mentally ill. Tr. p. 77-78. It further recognized that illness' impact on his life. Tr. p. 78 L. 1-10. However, the District Court did not make any findings as to whether Mr. Hall had been exposed to long periods of seclusions, restraints, and improper mental health treatment. Tr. p. 78, L. 11-21. The District Court did not make these

findings because the District Court did not believe these facts, if found by the District Court, should affect the sentence. *Id.* The Court did not find that solitary confinement for the mentally ill is not pretrial punishment in violation of Due Process. *See id.* If the Court had, such a conclusion would have been in error. For the purposes of this appeal, however, it if sufficient to note that the error in not recognizing the significance of Mr. Hall's conditions of confinement on his sentence that occurred was not harmless, because if the District Court had recognized that presentence conditions of confinement could affect the sentence, they most certainly would have in this case.

CONCLUSION

For the above stated reasons, this Court is asked to reverse the judgment of the District Court and remand for a new sentencing that will take into account the state's treatment of Mr. Hall's during his pretrial incarceration.

DATED this 26 day of April, 2015.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: Jay Logsdon
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 29th day of April, 2015, served a true and correct copy of the attached BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] First Class Mail [ ] Certified Mail [ ] Facsimile (208) 854-8071
X	Stephen W Kenyon Clerk of the Courts Idaho Supreme Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	[X] First Class Mail